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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

No. 585.

JOHN POKORA, Petitioner,

vs.

THE WABASH RAILWAY COMPANY, a Corporation,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF OF RESPONDENT.

WALTER M. ALLEN,
N. S. BROWN,
Counsel for Respondent.

HENRY A. CONVERSE,
HOMER HALL,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CE ntral 4477.

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BRIEF OF RESPONDENT.

STATEMENT OF CASE.

The Circuit Court of Appeals made a concise statement of the salient facts of this case and we take the liberty of setting forth that statement here.

"By this action appellant (petitioner) seeks to recover damages alleged to have been sustained by him as a result of being struck by appellee's (respondent's) railway train at a grade crossing in Springfield, Illinois. The first count

of the declaration contained a general charge of negligence; the second count described the environment in detail and alleged special negligence on the part of appellee, in that it placed certain freight cars on a switch track in close proximity to the intersection in question and that it had operated its train toward the intersection at a high and dangerous rate of speed; the third count charged a willful and wanton injury, again describing the environment with particularity. At the conclusion of appellant's evidence the Court instructed the jury to find for appellee, which it did, and judgment was thereupon entered for appellee for costs.

"Viewed in the light most favorable to appellant, the evidence submitted supports the following facts: Tenth street in the City of Springfield runs north and south. It is intersected by Edwards street, which runs east and west, and at this point the accident happened. Appellee's railway tracks and station are located on Tenth street, and the station is five city blocks due north of Edwards street. At the intersection referred to appellee has four tracks. East of and parallel with the main track is one switch track and on the west of the main track there are two switches. On the northeast corner of the intersection of the streets there is located an ice plant. Its main building is flush with the west and south property lines and has a frontage of about eighty feet on Edwards street. The west property line of the ice company is parallel with the railroad tracks and is seventeen and a half feet east of

the east rail of the east switch and thirty and a half feet east of the east rail of the main track. Thirty feet east of the main building, and seven and a half feet north of its south line, is located the ice company's service station, which has a frontage of thirty feet on Edwards street. Fifteen feet east of the service station is a public alley, running north and south. Edwards street is eighty feet in width between property lines. The traveled portion is thirty feet in width and is paved with brick to the extended west property line of the ice company, and with macadam from that point to the first railroad track. The north line of the pavement is twenty-five feet south of the south property line of the ice company, and thirty-two feet south of the loading platform of the ice service station. At the intersection of the paved portion of Edwards street and the alley, which is about 175 feet east of the first railroad track, a driveway runs northwestwardly to the service station, and returns southwestwardly to the paved portion of Edwards street at about ninety feet east of the first track.

"Appellant was engaged in the grocery and retail ice business and purchased his ice from the company referred to. On the morning of August 17, 1929, he left his home at 5:45 a. m., when it was daylight, and with his automobile truck drove to the ice plant for the purpose of securing ice. He decided to go across the tracks to another plant of the same company which was located at the southwest corner of Edwards and Tenth streets. A string of

box cars was standing on the east switch track at a point from forty-two to forty-eight feet north of the center of Edwards street. At that time the scoring machine, composed of eight saws (used for sawing ice), was running and caused a loud singing noise which could be heard for the distance of a city block. Before entering upon the tracks appellant stopped his truck at a point from ten to fifteen feet east of the east switch. He remained in the truck and, without stopping his engine, looked north and south and listened for trains. Not hearing or seeing any, he drove across the switch track and upon the main track and was there struck by a southbound passenger train, which had stopped at the station, and was then traveling at an estimated speed of from twenty-five to thirty miles per hour without sounding the bell or whistle. Appellant's witnesses are not in accord as to the location of the rear end of the train when it stopped. They place it at different points from barely south of Edwards street to 150 feet below that point.

"Appellant had been in the habit of getting ice from both ice houses for the past ten years and was fully acquainted with the surroundings. He usually went any time from 6 to 7:30 o'clock in the morning, and had crossed the tracks at that point for the purpose of getting a quicker delivery of ice very frequently. He knew that there was an early morning southbound train and had seen it pass that place on many other days. On the morning of the accident no one was in front of him at the crossing; the watchman was

not there, and appellant knew that he did not come on duty until 7 o'clock."

To this statement we add that the petitioner did not see the train at any time, was in a hurry and had crossed the particular crossing hundreds of times; that there was much noise and confusion, due to the presence of numerous trucks being loaded with ice just east of the place petitioner stopped, and that in the highway, in close proximity to petitioner, whose motor was running, there was a model T Ford with its noisy motor also running.

The statement in the petition for the writ, on page 9, contains the following:

> "He (Otto Goetz) stated that Pokora had previously stopped at his ice house for ice, but the witness waved him on across the tracks, as that platform was crowded."

This is not supported by any evidence in the record, and such statement by counsel might be construed as indicating that Goetz gave the petitioner some assurance of safety.

The testimony of Goetz (R. 39) is as follows:

> "Our drivers were so crowded there at the platform that I waved him up and told him he would have to wait about twenty minutes until all the drivers were loaded out."

PROPOSITIONS OF LAW RELIED ON, WITH CITATION OF AUTHORITIES IN SUPPORT OF EACH.

I.

The question of due care very generally is left to the jury, but when dealing with a standard of conduct, and that standard is clear, it should be laid down by the Court.

Baltimore & Ohio Railroad Company v. Goodman, 275 U. S. 66.

II.

One attempting to drive an automobile over a railroad crossing with which he is familiar is negligent so as to prevent recovery for injury to himself and damage to his automobile by being struck by a train where, when his view of the track is obstructed, he does not stop, look and listen, where looking and listening would be effective, and if necessary leave the vehicle to make sure the crossing is safe.

Baltimore & Ohio Railroad Co. v. Goodman, 275 U. S. 66;

Sertich v. Baltimore & Ohio R. Co., 29 Fed. (2d) 112;

Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10 (7th Circuit);

Wabash Ry. Co. v. Zayac (7th Circuit), 30 Fed. (2d) 764;
Flack v. D. L. & W. R. Co., 45 Fed. (2d) 683;
Kilmer v. Norfolk & W. Ry. Co., 45 Fed. (2d) 532;
Reynolds v. Atlantic Coast Line, 44 Fed. (2d) 338;
Rogers v. C. R. I. & P. Ry. Co., 39 Fed. (2d) 601;
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Kutchma v. Atchison, T. & S. F. R. Co., 23 Fed. (2d) 183;
Leiby v. Pennsylvania R. Co., 58 Fed. (2d) 970;
Walton v. Oregon Short Line, 50 Fed. (2d) 352;
Southern Pacific Co. v. Day, 38 Fed. (2d) 958.

III.

To listen only when one cannot hear an approaching train because other noises obstruct the sense of hearing and to look only where the view of approaching trains is obstructed, is as careless and negligent of duty as not to look for and listen at all.

Kutchma v. Atchison, T. & S. F. R. Co., 23 Fed. (2d) 183;
Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410.

IV.

The cases distinguishing or thought not to follow Baltimore & Ohio R. Co. v. Goodman (276 U. S. 66), are where the driver of the automobile did all that a reasonable man could do and had his sight and hearing interfered with by darkness, fog or the like or where he was lulled into acting as he did by some act or invitation of the railroad.

Kilmer v. Norfolk & W. R. Co., 45 Fed. (2d) 532 (dissenting opinion);
Weinstein v. Powell, 61 Fed. (2d) 411;
Norfolk & W. Ry. Co. v. Holbrook, 27 Fed. (2d) 327.

V.

Where evidence is undisputed or of such conclusive character that if a verdict were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party. The view that a scintilla or modicum of conflicting evidence, irrespective of the character and measure of that to which it is opposed, necessarily requires a submission to the jury has met with express disapproval in the federal courts.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 343;
Herron v. Southern Pacific Co., 283 U. S. 91, 95;
Gunning v. Cooley, 281 U. S. 90, 94;

Small Company v. Lamborn Co., 267 U. S. 248;
Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10.

VI.

When the question is one of general law and there is no governing statute nor local rule of property involved, the federal court will exercise its own judgment uncontrolled by the decisions of the courts of the several states.

Herron v. Southern Pacific Co., 283 U. S. 91;
Lake Shore etc. R. Co. v. Prentice, 147 U. S. 101, 106;
25 Corpus Juris 846, Sec. 185.

VII.

In order to establish a charge of willfulness in the federal courts, the engineer operating the locomotive must have seen or known of the impending danger of the plaintiff and then failed to exercise ordinary care to avoid the injury or must have failed to discover the danger through recklessness or carelessness, when it could have been discovered by the exercise of ordinary care.

Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10;
Conrad v. Wheelock et al., 24 Fed. (2d) 996 (So. Dist. of Illinois);
Blunt v. Chicago, M. & St. P. R. Co., 34 Fed. (2d) 63 (No. Dist. of Illinois).

VIII.

In the federal courts the rule of the last clear chance, which in effect is willfulness, is that there must appear subsequent negligence on the part of the defendant after actual discovery of plaintiff's peril.

Kansas City Southern Ry. Co. v. Ellzey, 275 U. S. 236, 241;
Walker v. E. St. L. & S. Ry. Co., 25 Fed. (2d) 579;
Wheelock v. Clay, 13 Fed. (2d) 972;
Kinney v. Chicago G. W. Ry. Co., 17 Fed. (2d) 708;
Penn. R. Co. v. Swartzel, 17 Fed. (2d) 869.

SUMMARY OF THE ARGUMENT.

The evidence viewed in the light most favorable to petitioner shows that petitioner was guilty of contributory negligence.

The standard of care laid down in Baltimore & Ohio Railroad Co. v. Goodman, 275 U.S. 66, should not be modified, but should be applied in this case.

There is no evidence to support the charge of willfulness.

ARGUMENT.

This case rests upon the testimony introduced by the petitioner, viewed most favorably in his behalf.

While we do not intend to argue the question of the negligence of the respondent, we call attention to the fact that there is no evidence as to the speed of the train at the time of the accident, as the only witness testifying as to the speed saw it only as it passed the door of his office two blocks north of the crossing (R. 48, 49); and that the evidence as to sounding of the bell and whistle is of a negative character, as the witnesses who testified on this question were remote from the scene, or were paying no attention, or were engaged in their own personal activities, or were subjected to the distracting noises of motors of trucks or other automobiles, and the singing noise of the ice saws, which could be heard a block away (R. 40), or the noise and confusion of trucks being loaded with ice at the ice factory, which conditions surrounded and applied to the petitioner and go to establish his contributory negligence.

In its opinion the Circuit Court of Appeals describes with particularity the location of the crossing, the buildings, the tracks and other things, giving with exactness the property lines and distances between tracks, describing the paved portion of the highway and the distances that petitioner could have seen along the main track to the north.

The petition for the writ of certiorari (p. 6) contains the following:

> "To sustain the charges contained in the declaration of the plaintiff fifteen witnesses were introduced. Wade Seeley (Tr. 29), a civil engineer and surveyor for the past twenty-seven years, identified a plat made by him of the intersection in question, showing in detail the location of the tracks, width of the streets, location of the buildings, obstructions to the view of persons traveling west on Edwards street, and various measurements appearing on the plat. This plat was introduced without objection and is most important in the opinion of counsel for the plaintiff. Attention will be called to it later in the argument."

The record shows that on the trial of the cause the petitioner introduced in evidence a plat of the intersection of Tenth and Edwards streets, made by a civil engineer and surveyor, who testified that the location of buildings and the measurements indicated on the plat were true and correct. The plat was exhibited to the jury (R. 29), and was shown to three of petitioner's witnesses, and their testimony had direct reference to it (R. 39, 46, 50).

The plat was not incorporated in the transcript on appeal in the Circuit Court of Appeals, and is not in the record in this court. It may be assumed that facts shown on the plat were considered by the Circuit Court of Appeals, because the plat was before the Court on oral argument and the majority opinion makes reference to specific locations and distances not shown in the testimony of

witnesses (R. 69, 70, 72). In the dissenting opinion it is said, "Two witnesses testified there were box cars on each of the two east tracks, but in view of the plat, which appellant offered in evidence, this is probably an error" (R. 72). The plat, however, is not a part of the record in the case. When this important portion of the evidence, which was offered on the trial, referred to by the witnesses in connection with their testimony, considered by the trial court in ruling that the petitioner had not made a case for the jury, and evidently considered by the Circuit Court of Appeals in deciding that the lower court ruled correctly, has been wholly omitted from the record in the case, will the lower court be convicted of error and its judgment be reversed by this Court, when it has not before it the evidence upon which the lower court based its ruling?

The Established Evidentiary Facts Show Petitioner's Contributory Negligence.

The respondent believes that the evidence in this case shows conclusively that the petitioner was guilty of contributory negligence, and that a recital of the facts will lead to the conclusion that the ruling of the trial court and the decision of the Circuit Court of Appeals were correct and should be affirmed.

The undisputed facts are as follows:

1. The accident happened in broad daylight.

2. The petitioner was familiar with the crossing and the surroundings and he had passed over the crossing hundreds of times (R. 31, 32).

3. The petitioner knew that a southbound passenger train passed the crossing about the hour of the accident, that there were no gates or bars at the crossing, that no crossing watchman was on duty at that hour, and that sometimes the train did not whistle (R. 31, 32, 33).

4. The petitioner stopped his automobile twenty-eight feet east of the main track and ten or fifteen feet east of the switch track, where he could see somewhat to the north of the south end of a box car which was standing on the switch track forty-two to forty-eight feet north of the center line of Edwards street, in which he was traveling westward, and petitioner's view rapidly increased northwardly as he traveled west, and when eight feet from the main track his view of that track northward was unobstructed (R. 32, and Opinion of Circuit Court of Appeals, R. 68, 69, 70, 72).

5. The petitioner stopped at a point where he knew his view northward along the main track was obstructed by a box car standing on the switch track north of the street and east of the main track (R. 32).

6. The petitioner was in a hurry and did not stop the motor of his truck (R. 31, 32). He knew there were numerous other trucks in the immediate vicinity east of him being loaded with ice, that the motor of a noisy Model T

Ford was running immediately back of him and that the machinery at the ice plant just east of where he stopped was making a noise which could be heard a block away (R. 29, 38; 39, 40).

8. The petitioner did not alight from his truck or make any effort to learn whether a train was approaching, except to look and listen when ten or fifteen feet east of the switch track, although he knew the box car on the switch track obstructed his view, and that the noises of automobiles and the ice factory immediately east of where he stopped would interfere with his hearing a train (R. 29, 31, 32, 40).

9. The petitioner ran his truck westward along the north side of the street and close to the box car on the switch track where his view to the north was most obstructed, when by driving near the center of the street at a distance of forty-two to forty-eight feet south of the box car he would have had a much farther and rapidly extending view northward along the main track as the freight car on the switch track was six, eight or ten feet north of the sidewalk (R. 32, 35, 46, and Petition for Writ, p. 7).

10. The petitioner was not signaled by anyone to cross the track and no one went across immediately in front of him (R. 33). The petitioner erroneously stated in his petition for the writ that Goetz, an employe at the ice factory, "waved him on across the tracks" (Petition for Writ,

p. 9). The witness testified that the drivers were so crowded at the loading platform that he waved petitioner up and told him he would have to wait about twenty minutes until all the drivers were loaded out (R. 39).

11. The petitioner did not stop or look again to the north as he approached the main track, when by so doing he could have increased his view to the north, but he looked straight west and drove onto the track without seeing the train and without knowing what struck him (R. 32, 33).

The rule stated in Baltimore & Ohio v. Goodman, 275 U. S., l. c. 70, is directly applicable here. The Court said:

> "It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If, at the last moment, Goodman found himself in an emergency, it was his own fault that he did not reduce his speed earlier or come to a stop. It is true, as said in Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and, when the standard is clear, it should be laid down once for all by the courts."

In Herron v. Southern Pacific Co., 283 U. S. 91, at page 95, the Court said:

> "Where, in an action in a federal court to recover damages for personal injuries, contributory negli-

gence or assumption of risk constitutes a defense, and, by reason of the facts being undisputed and of the absence of conflicting inferences, the evidence of contributory negligence or assumption of risk is conclusive and the question is one of law, the Judge has the right and duty to direct a verdict for defendant" (citing cases, including Baltimore & Ohio R. Co. v. Goodman, 275 U. S. 66, 69, 70).

The Court has never modified, varied from or cast any doubt upon the standard of conduct so definitely and clearly stated in the Goodman case. The facts in this case are not identical in every detail with the facts in the Goodman case, but respondent believes that in every essential particular the negligence of the petitioner is as fully and fairly established as was the negligence of the deceased automobile driver in the Goodman case, and that the same decision should be reached in this case as in that one.

The Rule Announced in Baltimore & Ohio Railroad Co. v. Goodman, 275 U. S. 66, Should Not Be Modified.

Counsel for petitioner does not question the soundness of the ruling in the Goodman case, but limits his argument to a suggestion that it be modified in this case and in other cases where an accident happens at a grade crossing in a populous city (Brief of petitioner in support of petition for writ, p. 28).

His particular criticism of the Goodman case is based upon his assumed conclusion that it lays down the requirement that the driver of an automobile must always alight from his car and go forward and get an unobstructed view of the track.

We do not assume to tell the Court what it meant by the language used in the Goodman case, but it seems certain that no such requirement is stated in it.

The Goodman case was decided October 31, 1927, and has been followed by Circuit Courts of Appeals and District Courts in many cases, and we do not find a reported case making the distinction sought by counsel for petitioner.

The Circuit Court of Appeals in this case gave this argument, advanced by petitioner, serious consideration and decided (R. 71) as follows:

> "* * * We are unable to understand why the rule there laid down does not apply to a crossing in a city as well as in the country; if it were otherwise a traveler would be required to exercise more care in crossing a railroad track in the country where his vision was less obstructed than in a congested city where it is more restricted."

Every court in the land holds that a railroad crossing is a place of known danger; that the train cannot stop for the highway traveler nor turn out for him; that it is the duty of the traveler on the highway to stop for the train

and not the train to stop for him. It is common knowledge that an automobile may be brought to a stop from a high speed in a very few feet, while the time and distance in which a train may be stopped are much greater.

All courts agree that it is an idle gesture for the traveler to look where he cannot see or to listen when distracting noises prevent him from hearing. But that is exactly what the petitioner did in this case, as the undisputed evidence clearly shows.

The language in the Goodman case is clear, concise and unequivocal.

The admonition that the driver of the automobile should get out and go forward is limited (275 U. S., loc. cit. 69) to those rare cases where,

> "* * * if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

But the standard of care laid down in the Goodman case does not require that the driver alight in all cases where the view is obstructed, but in such cases the driver must take some other reasonable precautions. This Court further said:

> "It seems to us that if he relies upon not hearing the train or any signal and takes no further precautions he does so at his own risk."

In the case at bar the Circuit Court of Appeals did not base its decision upon the failure of petitioner to get out of his truck, but it did hold that he stopped at a point where his view of the track was limited, and his hearing was interfered with by distracting noises, and that he could have approached the track near enough to get a clear view or at least a better and sufficient view, and, therefore,

> "* * * it was his duty, under the authority of the Goodman case, to take further precautions."

The petitioner testified that he did not see the train at any time and that after he started his truck he only looked straight west, therefore he did not look where and when his view was unobstructed, as he could have done, but he went upon the track relying solely upon his hearing. It is evident that he did not look after he got to a place where he could see, which was a safe distance from the main track, for the train was then in plain view, and he said he did not see it. The only precaution he took in his hurry was to stop (leaving his engine running) and rely solely upon his hearing, at a point where he knew he could not see.

It may be asked, what other precautions could he have taken?

Bearing in mind that he knew he was about to enter a zone of imminent danger, he could have alighted from

his truck and looked northward, or he could have asked one of the automobile drivers a few feet behind him to flag the crossing for him, or he could have stopped in safety nearer the tracks and obtained an unobstructed view north of the crossing. If he had taken the time and precaution to stop his own motor that small interim of time might have saved him from the collision. The interim of time between safety and peril was but a fraction of a second.

The trial judge, Honorable Louis FitzHenry, now on the Circuit Court of Appeals for the Seventh Circuit, had the rule in the Goodman case before him in the case of Conrad v. Wheelock, 24 F. (2d) 996.

In that case the Court said:

> "I do not understand that the Supreme Court of the United States laid down any new rules in the Goodman case. It does not reverse, or modify, or change, in any respect, the substantial rules in negligence cases of the character there disposed of by the Court.
>
> "But it does this: It admonishes the Circuit Courts of Appeal and the United States District Court that it is their duty to apply the law in cases of this character.
>
> "It has long been the law that when a person goes into a place of danger, known by him to be a dangerous place, he must exercise care for his own safety commensurate with the dangers and incidental perils he encounters in entering the place; he must exercise that degree of care which an ordinarily prudent person would exercise under like circumstances.

"A railroad crossing, even in the great open spaces, is a dangerous place; where it crosses one of the main highways or streets of a city or village is a dangerous place."

This Court granted the writ of certiorari in the Goodman case to bring up the case from the Sixth Circuit because of the conflicting decisions in grade crossing cases in the various circuits.

In Baltimore & Ohio R. Co. v. Shaw, 35 F. (2d) 410, Judge Buffington reviewed the conflicting decisions in the United States courts in cases involving automobile accidents at railroad crossings.

He pointed out the view taken by the Circuit Court of Appeals of the Third Circuit twenty years previous upon the advent of the automobile as an active agent of transportation on the highway, and that this Court, in the Goodman case, had affirmed the views of the Third and Eighth Circuits. In that opinion the Court said:

"Now, while no absolute rule of conduct can be laid down, because necessarily each case stands on its own facts, the general principle is that where an automobile driver, in attempting a passage takes, as was there said, chance instead of precaution, and makes chance, not sight, the guarantee of his safety, he is not taking due care, and lack of due care which brings about an ensuing accident is contributory negligence."

As Judge Buffington pointed out, twenty years before the decision in the Goodman case, the Circuit Court of Appeals for the Third Circuit called attention to the fact that an automobile coming into collision with a railroad train was a menace to the train and its crews and passengers.

It is nothing new for a court to lay down a positive standard of care. For many years it has been a positive rule in many state courts that the traveler upon the highway must stop, look and listen before attempting to cross a railroad at grade, and where such failure is established as a fact, recovery in those states is denied as a matter of law.

Counsel for petitioner asserts that drivers of automobiles in populous cities do not alight and go forward and that such a requirement is unreasonable.

Since counsel makes such a positive assertion, we feel that we are justified in stating that it is a matter of common observation that motorbus companies require their operators, even where there is only one man in charge of the bus, to alight and go forward and get a clear view of the railroad track before attempting to cross a railroad at grade.

In the dissenting opinion in the case at bar the learned Judge cited cases wherein the Goodman case was distinguished.

We will not lengthen this brief by a discussion of those cases, but call attention to the fact that in those cases,

upon the evidence in each case, the Court found a distinction, but in no case is the rule in the Goodman case questioned nor do any of those cases disclose a situation similar to that in the case at bar, and none of them would be authority for making any such distinction in this case.

The dissenting opinion lays great stress upon the fact that there were box cars standing upon the last switch track. The Judge dissenting said:

> "Had appellant gone forward upon the switch track before stopping to look and listen he would have encountered the new danger of possible movement of the string of box cars" (R. 73).

The learned dissenting Judge clearly indulges in conjecture and speculation as to the danger of the cars on the switch track being moved. There is nothing in the record to warrant such speculation. The petitioner did not testify that he had any fear that those cars would be moved over the crossing, and there is no testimony tending in any way to show any movement of those cars. One witness testified: "There are always box cars or freight cars standing on the east track there on the north side of Edwards street" (R. 51). There is positive evidence that the petitioner knew that the train which struck him was due to pass over the main track at about that time. It seems illogical to hold that petitioner was justified in driving onto the main track without looking when he knew there was a train likely to pass on that track, and should

be excused for not stopping on the switch track because of an assumed possibility that the cars on that track might be moved, when he had stopped just east of that track and saw that there was no locomotive attached to those cars and he had no reason to expect that the cars on that track would be moved.

We must bear in mind that this was a warehouse district, that box cars on sidetracks were of necessity placed for the business purposes of the public, and counsel for petitioner admits that such placing of box cars upon sidetracks of the railroad was not negligence, although he so charges in his declaration.

If the presence of the box cars created an additional danger, then it was the duty of petitioner to take precautions commensurate with this danger. When he stopped ten or fifteen feet east of the switch he could see that there was no locomotive attached to the box cars upon the switch track, and, having seen there was no danger of the cars on the switch track being moved, it was his duty to go upon the switch track and stop where he would have been able to get a view of the main track.

The dissenting opinion, in apprehending danger from the presence of the box cars on the sidetrack, would place plaintiff in position of hazard that is not shown to exist.

Petitioner's contributory negligence is clearly established, and this case might well be decided upon but one portion of petitioner's testimony:

> "I saw nothing, and that is all I know (R. 29); I don't know what hit me even (R. 30). I was going along the north side of Edwards street, near the north curb, and was looking straight west (R. 32). I did not see the train at all. The next thing I know I was in the hospital. I have never seen the train. I don't know what hit me" (R. 33).

We respectfully submit that this testimony alone should end petitioner's case. It is inconceivable that petitioner could have gotten on the track and been hit by the train and not see the train, if he was looking. His evidence shows conclusively that he did not look at a place where he could see, for he says he looked straight west, instead of north, the direction from which he knew the train came. This alone establishes a clear case of contributory negligence.

Further, petitioner was in a hurry, stopped about twenty-eight feet from the main track at a place where his view was almost wholly obstructed, let his engine continue running, and did not alight from his truck and go forward, or stop or look nearer the track. He knew there was no watchman at the crossing and was not induced by the railroad company, by any act of commission or omission, to attempt to cross. He was familiar with the crossing, had crossed it hundreds of times and knew that the passenger train in question was due at about that time.

The trial court was of the opinion, after hearing the evidence, that it could not let a verdict for the plaintiff

stand, if the jury should return one, and it was therefore its duty to direct a verdict for the defendant.

It seems to us that this case falls clearly within the rule in the Goodman case, for the evidence discloses that the petitioner stopped where he could not see, and listened at a time when, and place where, he could not hear, and without taking any further precautions proceeded to go upon the crossing, where he was struck by the oncoming train, and the Court performed its judicial duty by directing a verdict. We cannot see why, under such circumstances, the Court should submit to the jury the question whether plaintiff was exercising such reasonable care for his safety as a reasonably prudent person would exercise under the same or similar circumstances. In such a case the stopping to look where the driver cannot see and listening where he cannot hear cannot be considered as reasonable and prudent conduct when the driver knows that he is dealing with a question of life or death for himself and others, and when, as the record shows, he could have taken further precautions which would have enabled him to see the train and avoid injury.

He wholly failed to exercise the standard of care laid down in the Goodman case. The trial court (R. 55, 56) and the Circuit Court of Appeals (R. 70, 71) quoted the material portions of that opinion and rightly relied upon that decision.

The lower courts (R. 53, 70) referred to the case of Wabash v. Zayac, 30 Fed. (2d) 764. Counsel for petitioner

seeks to distinguish this case from both the Goodman and Zayac cases (Petitioner's Brief, pp. 18-23) on the ground that in both of those cases the drivers of the auto failed to stop before attempting to cross the tracks.

True, Goodman did fail to stop, but slowed down to five miles an hour, but Zayac did come to a full stop.

We quote from the opinion in the Zayac case, 30 Fed. (2d), at page 765:

> "One witness two or three hundred feet from the crossing saw the automobile, headed west, with people in it, stop at the crossing. Another, three hundred feet south of the crossing, saw people in both seats of the automobile as it stopped ten or fifteen feet from the north track."

Counsel for petitioner urges that the rule in the Goodman case should not apply in populous cities. Under our Propositions of Law II we have cited many cases in the various federal circuits following the Goodman rule, but we fail to find any making the distinction urged by counsel for petitioner.

The location of the crossing may have a direct bearing upon the negligence of the railroad, but a grade crossing is a place where trains run, no matter where located, and whether or not the given case may involve negligence of the railroad, the driver of the automobile is held to the same standard of care when he goes into such a place of known danger.

Under our Proposition IV are cited some of the cases distinguishing the rule in the Goodman case. We have found no case that relieves a plaintiff who attempts to cross a railroad at grade, with which he is familiar, in broad daylight, when he knows it is the usual time for a train, and knows there are no gates, and no watchman on duty at the time, and stops to look and listen at a place where he cannot see and where there are distracting noises and activities, when he could have made sure by alighting or by driving near to the center of the street instead of close to the freight car on the switch track, or by stopping eight or ten feet from the main track where he could have seen for a long distance down a straight track, or where he could have taken other precautions. The duty is the same in all cases, whether the location is in the open country, village, hamlet or populous city.

Petitioner's testimony establishes beyond all question that he stopped and looked at a place where he could not see or hear, and that he neither stopped nor looked at a place where he could have seen the train. The noise and rumble of the train was heard by one witness who was a block away (R. 37), and by another witness who was one hundred and fifty feet west of the railroad (R. 45, 46, 48). The noise at the ice factory was so great that the witness Goetz did not even hear the crash when the engine struck the truck (R. 39, 40). It was under those conditions that petitioner listened for the train.

The Court in Garrett v. Pennsylvania Railroad Co., 47 Fed. (2d) 10, at page 12, says:

> "A traveler approaching a railroad crossing must look and listen at places and at times where and when his senses give notice of approaching trains."

To the same effect are:

Kutchma v. Atchison, T. & S. F. Ry. Co., 23 Fed. (2d) 183;
Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410.

A case so nearly on all fours that we need only change the names of the parties is Sertich v. Baltimore & O. R. Co., 29 Fed. (2d) 112. The material portion of the opinion is as follows:

> "Plaintiff was thoroughly familiar with the crossing where he was injured. When he drove upon it he knew that the fast train that struck him was due. Notwithstanding this, he drove his heavily overloaded truck onto the crossing behind box cars which stood on a spur track and which shut off his view in the direction from which the train was approaching. He took no precaution other than to stop just before reaching the box cars and listen for the train with the noisy motor of his truck still running. Not hearing the train he proceeded, although he knew or should have known that if it was approaching he would be in the danger zone before he could see it. He voluntarily took the chance which the situation involved

and, under the doctrine of the Goodman case, he cannot recover."

We do not desire unnecessarily to lengthen this brief by discussing other cases cited under our proposition II, but believe they all sustain the action of the trial court and Circuit Court of Appeals in this case.

However, Baltimore & Ohio R. Co. v. Shaw, 35 Fed. (2d) 410, gives an interesting discussion of the development of the law relative to automobile grade crossing accidents. That case is very persuasive in this case because there the declaration set up in detail the dangerous environment. Further, there was a crossing watchman on duty, whose back was turned. The plaintiff came from behind a shanty house at the corner of the crossing, so that his automobile was within three feet of the track upon which the train was coming before he could see down the track. The Goodman rule was applied and plaintiff was denied the right to recover.

Counsel for petitioner relies upon the case of Norfolk & W. Ry. Co. v. Holbrook, 27 Fed. (2d) 326 (Petitioner's Brief, p. 28), which is one of the class that some Circuit Courts of Appeals consider is not within the rule in the Goodman case. It will be noted that Holbrook's view was wholly obstructed, at the point where he stopped, by a dense fog, which the Court says prevented him from seeing any distance. In distinguishing that case from the Goodman case the Court said:

"Goodman did not stop and look after he had reached a point where he could, and while he could do so effectively. Holbrook after reaching that position did stop, look and listen; he could have taken no precaution in the way of looking which he did not take. It is, of course, true that in such a fog the traveler must exercise a degree of care appropriate thereto; yet where he cannot, by waiting or changing his position, look effectively, then to secure his safety he must rely upon his sense of hearing."

Surely no one can say that petitioner here could not, by changing his position or waiting, have looked and listened effectively. It is stretching the rule too much to try to bring Pokora in broad daylight within the rule applicable to one whose view is wholly obstructed by a dense fog.

Respondent believes the Goodman case states the rule clearly applicable to the facts in this case and that it should be applied here without modification or deviation.

There Is No Evidence to Support the Charge of Willfulness.

It is not disputed that contributory negligence of the plaintiff is no defense to a charge of willfulness, if proved. It is evident that the charge of willfulness was injected into this case in the vain hope that enough proof might be produced to let the case go to the jury on that theory and thus escape the rule of the Goodman case.

Petitioner in his brief, page 23, states that

> "If there be evidence in the record to sustain the allegations of that count, the Court should not have directed a verdict, but the Court should have required the defendant to put in its evidence:"

Petitioner seeks to invoke the state rule of scintilla or modicum of evidence.

That is not the rule in the federal courts, as was recently held in Gunning v. Cooley, 281 U. S. 90, 94; Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333; Garrett v. Pennsylvania Railroad Co., 47 Fed. (2d) 10.

Petitioner in his brief on the petition for certiorari, page 17, under Authorities and Propositions VIII, IX and X, cites cases from Illinois courts which we submit are not even persuasive in the federal courts, and are in conflict with the federal decisions.

He cites no federal authorities which bring the facts in this case within the field of willfulness as decided by the federal courts.

In the willful count (R. 8, 9) the pleader, after detailing the environment in great detail, states that plaintiff's view was wholly obscured by buildings and cars so that

> "just as he drove his automobile onto one of said tracks he saw an engine and train of cars approaching said intersection from the north at a high and dangerous rate of speed, to wit, at a speed of twenty-five miles per hour, but that it was then too late to

stop his car or clear said track on which the train of the defendant was being operated."

Under these allegations, if the driver of the truck saw the train too late to stop, then clearly the engineer on the right-hand or west side of the engine could not see the truck in time to stop, as it came from behind the car on the switch track.

Further, there is not a scintilla of evidence in the record that any servant of respondent saw petitioner in time to stop nor that they intentionally ran into the truck.

The fact that the truck went over the east rail only and did not get to the middle of the track (R. 37, 38), as one witness testified, and the position of the truck and of petitioner after the accident, on the east side of the track (R. 34, 36, 38, 39), show that the engine was close to the crossing when the truck came into view from behind the box car, and that the engineer had no opportunity to prevent the collision.

The testimony of Roland Burris, who lived 150 feet west of the Wabash tracks, that he heard the brakes squeaking on the train (R. 45), and the fact that the train stopped with the rear or north end just over the sidewalk on the south side of the crossing (R. 45, 47), show that the engineer acted promptly and did all he could to stop the train, and disprove the allegations of willfulness and wantonness.

The whole charge of willfulness therefore boils down to

whether or not a speed of twenty-five miles, if proved, without sounding the warnings, was so gross and wanton as to impute willfulness under the federal decisions.

We have shown the Court that there is no evidence in the record as to the speed of the train at the crossing.

The trial court (R. 54) pointed out the slight character of the evidence on speed and then concluded that a speed of twenty to thirty miles per hour in this day and age is even slow and moderate.

The crossing was similar to thousands of intersections in cities where railroads in the due course of business are required to maintain sidetracks and leave cars for loading and unloading at warehouses and other buildings such as those in the instant case.

When we visualize automobiles and large trucks running through residential and business districts at speeds anywhere from twenty to sixty miles per hour, with large buildings flush with the intersections on all corners, with cars and vehicles parked and double parked along the streets, no court, we believe, would hold that a passenger train, with the present demand for rapid transportation, was being operated so as to willfully or wantonly inflict injury when traveling at a rate of from twenty to thirty miles per hour.

In Conrad v. Wheelock, 24 Fed. (2d) 997, at page 998, the Court for the Southern District of Illinois stated the law as to willfulness as follows:

"It must have been intentional, 'or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as a failure,' and not only a failure, but 'after knowledge of the impending danger to exercise ordinary care to prevent it.' In other words, if the engineer here saw and knew the impending danger and peril in which the plaintiff's intestate was situated, just before and at the time of the injury, and then failed to exercise ordinary care to avoid the injury that killed him, that might have been the rule.

"The operation of the rule, 'after knowledge of the impending danger, to exercise ordinary care to prevent it, or a failure to discover the danger through recklessness or carelessness when it could have been discovered by the exercise of ordinary care,' is entitled to consideration."

The Judge who wrote the opinion in the Conrad case was the trial judge in the instant case.

In Blunt v. Chicago, M. & St. P. R. Co., 34 Fed. (2d) 63, there was a willful count which the Court held should be withdrawn from the jury because there was no evidence to support it. The declaration also charged:

"(a) That defendant carelessly and improperly drove, operated and managed its locomotive and train; (b) that it failed to give a reasonable warning by blowing a whistle or sounding a bell * * *; (c) that it operated its locomotive and train at an unreasonable rate of speed commensurate with the character of the crossing and the safety of the plaintiff; (d) that the

view of the railroad was obstructed by trees, weeds, brush and shrubbery which the defendant was under duty to cut."

The Blunt case was tried in the Northern District of Illinois, and at the conclusion of plaintiff's evidence the Court found there was no evidence to sustain a willful charge. The case of Conrad v. Wheelock, 24 Fed. (2d) 996, was cited with approval, and the Goodman case was cited and held to be applicable.

In Garrett v. Pennsylvania R. Co., 47 Fed. (2d) 10, there were several counts charging willfulness and wantonness on different grounds, among others failure to sound crossing warnings and excessive speed of train.

The Court held that there was a sharp conflict in the evidence as to failure to sound the statutory crossing warning, sufficient to let the case go to the jury, unless the plaintiff was guilty of contributory negligence. The view was somewhat obstructed and the train was running from sixty to seventy miles per hour.

The Court said:

"There was no evidence upon which the jury could reasonably say that the speed of the train, under all the circumstances, was so excessive and unreasonable as to amount to willful or wanton conduct; nor that there was any intentional failure to sound the statutory warning; nor that there was an intentional fail-

> ure to keep a sharp lookout for travelers about to use the crossing; nor that there was a conscious indifference on the parf of the engineer in relation to these matters. The Court's ruling in this respect is fully supported by the principles enunciated in Conrad v. Wheelock (D. C.), 24 Fed. (2d) 996, and cases cited therein."

The Garrett case was tried in the District Court for the Eastern District of Illinois. We have therefore cited the rule as to willfulness as determined by the Circuit Court of Appeals for the Seventh Circuit and each District Court in Illinois in recent cases involving automobile accidents at grade crossings. The evidence in the Garrett case was much stronger on the question of willfulness, and Judge Alschuler, who dissented in this case, concurred in that.

Under our proposition VIII we have cited cases upon the last-clear-chance doctrine and we refrain from lengthening this brief by a discussion of these cases, but believe they fully support the ruling that there is no evidence in this case to justify the submission of the case to a jury on that doctrine.

We respectfully submit that under the law as administered by the federal courts relative to automobile grade-crossing cases, both in relation to charges of negligence and willfulness, the trial court was not only justified, but

required, to direct a verdict for the defendant in the instant case, and that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

WALTER M. ALLEN,
N. S. BROWN,
Counsel for Respondent.

HENRY A. CONVERSE,
HOMER HALL,
Of Counsel.